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KENNETH JOHNSON

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH JOHNSON,

Defendant.

Criminal Case No. 20-cr-238-JLT-SKO

**DEFENDANT JOHNSON'S RESPONSE
AND JOINDER TO DEFENDATN
FRANCIS CLEMENT'S OPPOSITION
TO MOTION FOR REVOCATION AND
APPEAL OF ORDER PURUSANT TO
LOCAL RULE 430.1 [Doc. 873]**

Defendant Mr. Kenneth Johnson, by counsel, The Law Office of Ryan J. Villa, by Ryan J. Villa, and Andrea Lee Luem, submits this Response to the United States' Motion and Appeal [Doc. 854]. Mr. Johnson joins in Mr. Clement's Response [Doc. 873].

Mr. Johnson joined in Mr. Clement's Motion for Modification of Protective Order [Doc. 811], *see* Joinder [Doc. 814], which is the subject of the government's appeal. Mr. Johnson joined because the government has vaguely referred to providing similar discovery to Mr. Johnson under a similarly restrictive order "if it exists." To date, the government has produced no such discovery and has refused to confirm whether any such evidence exists. The government has not produced any discovery reflecting any oral, recorded, or written statement by Mr. Johnson related to Counts

1 Two and Three of the Second Superseding Indictment [Doc. 685]. Notably, Mr. Johnson faces the
2 death penalty for these two counts but has not been provided a single item of discovery that
3 connects him to these counts. To the extent the government intends to produce some discovery
4 now, more than a year after the original indictment of Mr. Johnson for these Counts, under a similar
5 protective order, Mr. Johnson joined in the requested modification so any order applicable to him
6 would contain the modifications sought by Mr. Clement.

7
8 Furthermore, Mr. Johnson intends to file a Motion to Compel the material that is the subject
9 of Mr. Clement's order because it relates to a predicate act with which Mr. Johnson is charged in
10 Count 1. While the government's position seems to be Mr. Johnson is not entitled to this discovery
11 because he is not involved in this specific predicate act, this is contrary to law. First, in order to be
12 guilty of Count One, the government must prove that at least two acts of racketeering were
13 committed. *See* Ninth Circuit Pattern Criminal Jury Instruction 18.14 RICO-Pattern of
14 Racketeering Activity; *see also* 18 U.S.C. §§ 1961(1) 1961(5). The Ninth Circuit has held that "if
15 a RICO conspiracy is demonstrated, [a]ll conspirators are liable for the acts of their co-
16 conspirators." *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 775 (9th
17 Cir. 2002) (citing *Investor Prot. Corp. v. Vigman*, 908 F.2d 1461, 1468 (9th Cir.1990) rev'd on
18 other grounds sub nom. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) (internal
19 quotations and citations omitted). Thus, if the government intends to argue to the jury that Mr.
20 Johnson is guilty of Count One because a predicate act was committed by Mr. Clement, or others,
21 and Mr. Johnson was conspiring with those individuals, then Mr. Johnson is entitled to receive this
22 discovery.
23

24
25 Further, the statements of Mr. Clement that were provided to his counsel, could be used
26 against Mr. Johnson as substantive evidence. While mere conversations between coconspirators
27

1 are not admissible, statements made by a coconspirator during the course and in furtherance of the
2 conspiracy are admissible under the federal rules of evidence. *See* Fed. R. Evid. 801(d)(2)(E). The
3 Court has held that statements made in furtherance of the conspiracy include statements that
4 “further the common objectives of the conspiracy or set in motion transactions that are an integral
5 part of the conspiracy.” *United States v. Yarbrough*, 852 F.2d 1522, 1535 (9th Cir.1988) (citing
6 *United States v. Layton*, 720 F.2d 548, 556 (9th Cir.1983)). Thus, Mr. Johnson should be entitled
7 to this discovery. As discussed, he intends to file a Motion to Compel this and other co-conspirator
8 statements.
9

10 Accordingly, Mr. Johnson joins in Mr. Clement’s request regarding the protective order.
11 Should Mr. Johnson receive any such discovery under a protective order, he submits that it should
12 not be restricted to his attorneys’ eyes only. As Mr. Clement has argued, this will lead to ineffective
13 assistance of counsel and deny Mr. Johnson the right to prepare a defense. Mr. Johnson’s whole
14 team, including his investigator and paralegal, need to review the information to help investigate
15 Mr. Johnson’s defenses and prepare for trial. Mr. Johnson should also be permitted to review the
16 material in order to properly prepare his defense. Mr. Johnson is not opposed to an order that limits
17 counsel’s ability to leave the material with him, but his counsel must be able to discuss the
18 statements with him as he is in the best position to determine the veracity of the statements or
19 identify potential witnesses who may have information that would rebut the statement or
20 undermine its credibility.
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23 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2023, I served a true and correct copy of the foregoing via ECF to:

All counsel of record.

/s/ Ryan J. Villa
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